In the Supreme Court of the United States.

OCTOBER TERM, 1900.

FRITZ CONTZEN, APPELLANT,
v.
THE UNITED STATES AND THE APACHE INDIANS. } No. 84.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEES.

STATEMENT.

This was a suit brought under the Indian depredation act of March 3, 1891, for the recovery of $10,330, the value of certain property alleged to have been taken from the appellant (the claimant below) by the Apache Indians in October, 1861. The defendants filed a plea to the jurisdiction of the court, alleging that the claimant was not at the time of the depredation a citizen of the United States. The court sustained the plea and dismissed the

petition. From this decision the claimant appealed. The sole question here presented is whether the appellant was a citizen of the United States on the date named.

The following is the agreed statement of facts:

> The claimant, Fritz Contzen, was born in Germany on the 27th day of February, 1831, and emigrated to Texas in July, 1845. He remained in Texas until the admission of the State into the Union, December 29, 1845.
>
> Since the admission of Texas the claimant has resided continuously in the United States, mostly in Arizona and some time in California. He visited Germany with his wife and child from 1873 to 1880, his home and furniture remaining all the time in this country. He was married in the United States. His residence was in Texas until he came to Arizona in 1855 with Major Emory, on the boundary commission.
>
> In the year 1854 he went into court at San Antonio, Tex., and he was told that he being a resident of Texas when it became part of the United States, that made him a citizen of the United States, and he voted there. He never took any further steps about naturalization. There is no record of naturalization from 1847 or of anyone of the claimant's name, when such record should appear in the courts of San Antonio.
>
> That in October, 1861, the defendant Indians were in amity with the United States.

ARGUMENT.

The question is whether Fritz Contzen was a citizen of the United States in 1861. It is admitted that he was born in Germany; that he came to Texas in July, 1845, and that he was not naturalized under the statutory pro-

visions prior to 1861. His sole claim to citizenship is based upon the collective naturalization effected by the admission of Texas into the Union. The inquiry is really, therefore, whether Contzen became a citizen on the day when the Republic of Texas became a constituent part of the United States.

The act of Congress proposing to receive Texas as a State was approved on March 1, 1845; the Congress of the Republic of Texas accepted the terms of that proposal in June, 1845; a convention called for the purpose adopted a State constitution in August, 1845; and on December 29, 1845, the President of the United States approved a joint resolution of Congress reciting the above facts and declaring that the State of Texas thereby became one of the States of the Union. The latter date was the true date of admission. (*Culkin* v. *Cocke*, 14 Howard, 227.)

In these resolutions and acts of the respective Governments, there is nowhere any express stipulation in regard to the question of citizenship, which is, therefore, relegated for decision to the general principles of international law. Now, it is elementary that when a sovereign state, or a part of one, becomes a part of another sovereign state, by conquest or otherwise, there is a transfer allegiance or citizenship, contemporaneous with the transfer of territory. This change is a transfer of allegiance on the part of a subject, or citizen; on the part of the Governments involved, it is a transfer of sovereignty. The two are reciprocal and mutual. Under modern principles of law, a change of status can not be made without the consent of both parties to the transaction.

The allegiance of the individual is not to be transferred from one sovereign to another except by his own consent and by his own acts; and, conversely, the sovereignty of any power is not to be extended to cover any individual without the consent and authority of the sovereign. These principles are applicable both to the inhabitants of ceded or conquered territory and to immigrants.

> The right to acquire a domicile in an adopted country may be regarded as one of the most valuable additions to modern international law. The consequence of the acquisition of such domicile is the loss by the abandoned country of all title to tax personally, or to exact either civil or military obedience. But this change of relations can not be effected, as Bar justly argues, by the emigrant's single will. He must be accepted as a resident in the country in which he settles. He must acquire, not merely a domicile, but be granted an asylum in such country. (Wharton, Conflict of Laws, sec. 75.)

In *Elk* v. *Wilkins* (112 U. S., 94, 99) it is said by the court that:

> Though the plaintiff alleges that he "had fully and completely surrendered himself to the jurisdiction of the United States," he does not allege that the United States *accepted his surrender*, or that he has ever been naturalized, or taxed, or in any way recognized or treated as a citizen by the State or by the United States.

And quoting from the opinion of Chief Justice Taney in *Scott* v. *Sanford*, to the effect that an Indian who should leave his tribe and take up his abode among the white population would be entitled to all the rights and

privileges which would belong to an immigrant from any other foreign State; the court says further (p. 101):

> But the emigrant from any foreign State can not become a citizen of the United States without a formal renunciation of his old allegiance and an acceptance by the United States of that renunciation through such form of naturalization as may be required by law.

In case where territory is transferred, the consent of the individual to a change of allegiance may be manifested, in the absence of treaty stipulation or statute law, by remaining in the country after the change of sovereignty. But the new government may establish any conditions which it may desire and prescribe any forms which it may deem necessary, in accordance with which the claimant's election must be made manifest. For example, in the transfer of territory from Mexico to the United States by the treaty of Guadalupe Hidalgo, those who desired to remain citizens of Mexico were obliged to record their election under certain specified forms (9 Stat. L., 930).

As firmly established as the foregoing is the principle that (still in the absence of treaty stipulation) inhabitants of the ceded territory are received into the new sovereignty with the same status which they enjoyed under their former sovereign, so far as this is possible under the respective forms of government. It is strongly implied by Vattel that the rights of citizens in conquered territory extend even to the same participation in the general government that they enjoyed before the conquest, provided the nature of the two governments are the same. (Vattel, Law of Nations, Book 3, sec. 199.)

A striking example of the application of this necessary and logical principle is found in the very act of annexation which is under consideration. There were in Texas, exclusive of all who owed allegiance to foreign governments, at least three classes of inhabitants. After the annexation these classes maintained, respectively, the same relation to the Government of the United States which they had previously borne to the Republic of Texas. The citizens of Texas became citizens of the United States; the slaves remained slaves; and the Indians, who, though resident inhabitants, free, and not owing allegiance to any foreign power, were yet not citizens of Texas, continued to hold the same anomalous relation to the new government.

CONTZEN WAS NOT A CITIZEN OF TEXAS AND, THEREFORE, DID NOT BECOME A CITIZEN OF THE UNITED STATES.

The application of this principle to the case in hand requires an answer to the question, Was Contzen a citizen of the Republic of Texas? If he was, then, there being no stipulation between the two republics in regard to the status of the inhabitants, the general principal would prevail and he would become a citizen of the United States.

If there had been no test provided by the statutory law, by which to ascertain whether one was at a given time a citizen of the Republic of Texas, then it would be necessary to inquire concerning the domicile of the claimant to citizenship, the length of his residence, the *animus memendi*, and the evidences of renunciation of

former allegiance. But in the Republic of Texas, as in the United States, there were express provisions by which citizenship was defined and limited.

At the time of Contzen's immigration, and up to December 29, 1845, citizenship in Texas must have been acquired in one of two ways. First:

> All persons (Africans, the descendants of Africans, and Indians excepted) who were residing in Texas on the day of the Declaration of Independence, shall be considered citizens of the Republic and entitled to all the privileges of such. (Constitution of the Republic of Texas, General Provisions, sec. 10; Hartley's Digest 1850, p. 38.)

And secondly:

> All free white persons who shall emigrate to this Republic and who shall, *after a residence of six months*, make oath before some competent authority that he intends to reside permanently in the same and shall swear to support this constitution, and that he will bear true allegiance to the Republic of Texas, shall be entitled to all the privileges of citizenship. (Idem., p. 37.)

The only provision of the law of Texas relating to citizenship, aside from these two constitutional provisions, was the statute enacted in 1837, which prohibited the appointment of aliens to office. (Laws of the Republic of Texas, 1837, p. 67.)

These laws, defining and limiting citizenship in the Republic of Texas, are exclusive, as are the constitutional and legislative declarations on the same subject in the United States. It can not be contended that citizenship in the Republic of Texas could be acquired in any

other manner than that there provided. Domicile was not sufficient.

Under the constitutional provision, the appellant, an immigrant from one of the German States, could not become a citizen of Texas until after a residence of six months, and then only by a formal act of naturalization. But he arrived in Texas in July, 1845, less than six months before the date when the Republic of Texas ceased to exist. Whatever may have been his intention, that intention could not operate upon his political status until it found expression in accordance with the provisions of law. It never was so expressed, and consequently he never became a citizen of the Republic of Texas.

It is an unwarranted assumption to say that the appellant came to Texas and resided there with the intention of becoming a citizen of the Republic. Texas was then an infant republic, weak in comparison with the great States which bounded her domain on either side; her political future was in doubt. It might well be that the appellant, while embracing the opportunity to better his fortunes by removing his effects and himself to Texas to participate in the prosperity of a growing country, nevertheless preferred to retain his allegiance to his own country and the protection of the German confederation. Instances are not rare, more especially in the case of British subjects, of men who have spent the greater part of their lives in this country without the intention of giving up their status as subjects of the sovereignty under which they were born. Certainly nothing is to be inferred from the fact of five months' residence. When, therefore, the Republic of Texas became a part of the

United States, the appellant was an alien inhabitant, a German subject; he was not a part of the "people of the Republic of Texas," and he no more became a citizen of the United States by the mere act of the annexation of Texas than the tourist within its borders, or the Africans and their descendants, or the Indians, who resided in Texas but were not members of the body politic and had not the status of citizens.

The Louisiana cases (Laverty and Dubois) cited by counsel for appellant are not parallel cases. There the territory belonged to the United States before the States were admitted and the warrant for the decisions is found in the language of the enabling acts creating the States out of such territory. So in the case *Boyd* v. *Thayer*, so far as the opinion in that case, concurred in by only four judges, proceeds on this line of reasoning.

The latter case, however, not only does not sustain the contention of the appellant in this case, but by implication negatives that contention, for the court said (p. 170):

> Admission on an equal footing with the original States * * * involves the adoption, as citizens of the United States, *of those whom Congress makes members of the political community* and *who are recognized as such in the formation of new States with the consent of Congress.*

This, in the case of Boyd, meant his adoption as a citizen of the United States, because, in the admission of Nebraska, the State constitution and the enabling act passed by Congress provided that all persons belonging to the class to which Boyd was held to belong (those

who had declared their intention to become citizens) should be "members of the political community," or, in other words, should be entitled to vote and hold office. It can not be doubted that if the organic law and the enabling act had been silent in regard to the status of persons who had declared their intention of becoming citizens of the United States, Boyd and all others similarly situated would have been obliged to complete their naturalization before they would have been permitted to exercise the rights of citizenship.

If, as appellant contends, residence alone could confer citizenship, no question could have arisen in the case of Boyd, for he had been a resident of the United States almost from birth. If the question of intention and the enjoyment of political rights were conclusive, Boyd could to the have been found to be a citizen without recourse arguments upon which the decision was in fact based, for he had enjoyed all the privileges of a citizen for many years, even to the extent of being elected governor of a State.

CITIZENSHIP NOT ACQUIRED AFTER ANNEXATION.

Contzen was, then, at the date of the admission of Texas not a citizen of that republic or of the United States, but, as said in the clear and concise opinion of the Court of Claims in this case, "a German subject lately arrived in Texas." After that time and up to the date of the depredation in 1861 he did nothing by which his status was changed. He could become a citizen of the United States only by a compliance with the forms provided by statute for that purpose.

It is urged that the appellant had the right of election of citizenship (nationality). This right is now universally admitted. But, as noted on the brief for the appellants (p. 8), "the time, circumstances, and conditions under which this election should be manifested are necessarily regulated by the laws and practice of the adopting, incorporating State." In both the republic of Texas and the United States the laws regulating such an election are explicit, and the appellant did not meet their requirements in either jurisdiction.

If by the appellant's right of election it is meant that he might simply by remaining in the annexed territory become a citizen of the United States, the position is not tenable. Such a course was sufficient, no doubt, in the case of a former citizen of Texas; but the privilege did not extend to tourists, to alien inhabitants, or to other classes of the population. It is to be remembered that there is no room for doubt as to who composed "the people" of Texas; and the appellant was not one of them.

There can be no resort to argument deduced from the law of nations to fix a status when both the fact and form are specifically decreed by positive municipal law. The right of election is not to be exercised solely at the option of the individual. The State has the right to receive or reject him as a citizen. If, as is indicated (though imperfectly) by his continued residence, the appellant had desired to become a citizen of the United States, he could have acquired that status upon making the proper showing as to his character and intentions and taking the proper steps to renounce his former allegiance. This he never did. Whether he decided to

remain a subject of Germany (in which country he afterwards lived, with his family, for a period of seven years), or whether he was not sufficiently interested in the matter to inform himself as to the steps required and complete his naturalization, we do not know, and it is not material.

It is argued that the appellant received "judicial assurance" that he became a citizen of the United States by the annexation of Texas, and that he has since relied upon that assurance. Counsel for the appellees can not admit that this statement is justified by the facts before the court. The agreed statement of facts follows the unsupported testimony of the appellant and means no more than its language conveys. The appellant may have been told that he was a citizen by his counsel, or by a clerk, or by a bystander, and his informant may not have been apprised of the true date of his arrival in Texas, or of the other facts in the case. Of course there was no thought of this alleged statement being considered as a judicial decision of the claimant's citizenship when it was admitted into the statement of facts. Such a decision would have had to be attested by record and would have been conclusive of the question in the court below.

CLASSES OF CITIZENS.

It is urged, however, that there is a class of citizens (*lato sensu*) including all the inhabitants resident in the country who are secure in the enjoyment of civil, personal, and property rights; those who have received the right of perpetual residence, being a kind of citizen of

an inferior order, subject to the society without participating in all its advantages.

If this use of the term "citizen" be admitted in the sense contended for, it still can not be doubted that the members of such a class would be excluded from the provisions of the act of March 3, 1891. The question here is not a question of protection in the rights of property or the exercise of civil or religious liberty. It is a question of the enjoyment of an extraordinary remedy granted by Congress in derogation of the rights of sovereignty and in derogation of the ordinary principles of international law as applied to the Indian tribes and expressly limited in its application to "citizens of the United States." It can not be doubted that the word is there used with its full significance. *Johnson* v. *The United States and the Ute Indians* (160 U. S., 546) is a case in point. The appellant in that case was a claimant under the same act of Congress for a depredation alleged to have been committed in 1866. It was shown that he migrated to the United States in 1848 at the age of 13 years and had been ever since a resident of the United States. His petition was dismissed by the Court of Claims because he was not a citizen of the United States, and the decision was sustained on appeal. The records of the Court of Claims contain many similar cases. There is no argument based on domicile or continuous residence which would not apply with equal force to them all.

The broad distinction between residence, domicile, inhabitancy on the one hand and citizenship on the other is that a necessary element of citizenship is allegiance, while a man may have a domicile in one country and

owe allegiance in another. In *Udny* v. *Udny*, quoted in *United States* v. *Wong Kim Ark* (169 U. S., 656), it is said "the question of naturalization and of allegiance is distinct from that of domicile."

> Nothing short of actual naturalization, carried out by such solemn and formal act as the laws of the particular country require, will have this effect. Domicile, residence preliminary to naturalization, declaration of intention, with renunciation of former allegiance or rights, will not suffice to give the character of citizen or subject of the country of adoption, which can be acquired only by the act of naturalization itself. (Cockburn, Nationality, pp. 135–136; quoted in Morse on Citizenship, p. 85.)

CITIZENSHIP NOT ACQUIRED BY A MINOR.

The nationality of birth can not be changed so long as the individual remains a minor.

> The nationality and the domicile of origin are preserved as long as the child is a minor; for during this period he had not, legally speaking, any will. But as soon as, agreeably to the law of domicile origin, the child obtains the age of majority, he is free to change his nationality and to choose another domicile. (Morse on Citizenship, p. 13.)

On the other hand, the minor children are incapable of expressing their will; neither silence nor election may be imputed to them; for to make a valid election it is necessary to be master of his own rights.

With regard to minors we believe that the principles conceded in regard to ordinary naturalization should apply in cases of annexation. The child follows the status of his father from the time of his

> birth; from that instant he has a nationality which nobody can change without his consent. Silence, as an election on the part of the father, in his name may not be imputed to the child; the father is not master to dispose of the nationality of his son, in case of annexation as in every other circumstance, or at least, in order to clothe him with this right, a special law giving him this power, or an express stipulation in the treaty, would be necessary. (Morse on Citizenship, pp. 147–148.)

The laws of the United States provide for the naturalization of minor immigrants, unaccompanied by their parents, only after they become of legal age.

The appellant was born in 1831 and was 14 years old when Texas was annexed to the United States. He could not have acquired citizenship therefore either in Texas or in the United States. When he became of legal age he was a resident of the United States, and had, as he still has, the option of becoming a citizen by naturalization on making proof of good moral character and satisfying the other requirements of the law.

PRESUMPTIONS NOT IN FAVOR OF APPELLANT.

It is urged that this is a case of peculiar hardship, and that the appellant is entitled to a favorable presumption, since he is a claimant of citizenship. If his claim of citizenship involved only his own rights; if he were claiming protection from political persecution, or asserting a right of participation in government, as in the cases cited on appellant's brief, where in each instance the question arose in a contested election, this principle would no doubt have application. In this case, however, it has no application, for various reasons.

In the first place, this is not a case of doubt to be resolved by the application of liberal rules of construction, but a case for the application of the mandates of plain statutes and recognized principles of law.

In the second place, this is a question of jurisdiction in a suit against the United States, and the statute, being in derogation of sovereignty, must be strictly construed. In the case of *Leighton* v. *The United States*, which arose under the same statute, the court said:

> Before any judgment should be rendered binding the United States, it is familiar and settled law that the statute claimed to justify such judgment should be clear and not open to debate. (161 U. S., 291.)

Again, it is a suit against an Indian tribe for a depredation committed by one or more of its members, the tribe being made a party by the superior power of the United States. In another case, also arising under the same statute, the court said:

> Again, as often affirmed in the decisions of this court, the Indians are in a certain sense the wards of the United States, and the legislation of Congress is to be interpreted as indicated for their benefit. (*Marks* v. *The United States et al.*, 161 U. S., 297.)

Moreover, if the question in this case turned, as argued by the appellant, on the change of domicile, and doubt existed, the presumption would be in favor of the preservation of the original nationality. For this we have so high an authority as the learned counsel for the appellant in this case.

> The legal presumption in favor of the nationality of birth, or of the domicile of origin, continues until proof of change. (Morse on Citizenship, p. 13.)

CONCLUSION.

Independently of the statute law and the constitutional provisions, and waiving the disability of minority, it might be successfully argued that Fritz Contzen was not qualified to acquire citizenship by the transfer of sovereignty from Texas to the United States. His residence had been too short to create a domicile; no other acts, prior to the date of annexation, are shown which would have indicated his intention to acquire a domicile in Texas; on the contrary, the lack of such intention may be inferred from his roving disposition, which carried him, as shown by the petition and the findings, from Germany to Texas, to Arizona, to California, to Germany again for seven years, back to Arizona or Texas, and finally to Arizona; and, although he might have a domicile without being a citizen, it will not be contended that he could acquire citizenship without establishing a domicile.

But, as we have seen, there is in this case no necessity to consider the question whether the appellant's intention was to remain in Texas, whether he had been in Texas long enough to acquire a domicile, or any other doubtful question of fact or law. To quote again the language of the distinguished counsel for the appellant:

> The question of domicile, meaning national domicile, has heretofore entered prominently into all discussions on the subject of citizenship or nationality, and the difficulty of defining domicile has embarrassed inquiry in this connection. *In the light of recent legislation in respect to naturalization by the nations* the discussion as to what does or does not

> constitute domicile must be of less frequent occurrence and importance. But it will remain, in the absence of naturalization, the controlling question wherever citizenship or nationality is claimed or denied on the ground of domiciliation alone. (Morse on Citizenship, p. 93.)

The Republic of Texas was one of the nations whose recent legislation removed all necessity for discussion of domicile as bearing upon citizenship. Naturalization was provided for by the fundamental law of the Republic. In respect to the status of a person who not only had been naturalized, but who did not come within the liberal provisions of the constitution which would have enabled him to apply for naturalization, and who was, therefore, expressly barred by positive law from becoming a citizen, there can be no doubt.

It is submitted that the appellant was, on December 29, 1845, still a subject of the German confederation, and of the German State from which he emigrated; that he had not become and could not have become a citizen of the Republic of Texas; that as a German subject he was not in a position to be affected by the collective naturalization of the people of Texas when that Republic became a part of the United States; and that the holding of the court below was without error, and should be affirmed.

JOHN G. THOMPSON,
Assistant Attorney-General.

LINCOLN B. SMITH,
Assistant Attorney.

O